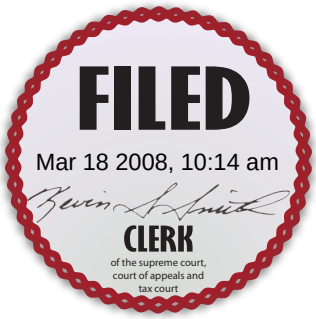

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IN THE
COURT OF APPEALS OF INDIANA

MARI SCHULTZ,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-0707-EX-626
	)	
FRANKLIN LOGISTICS, INC., SMITH TRANSPORTATION,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE WORKER'S COMPENSATION BOARD
The Honorable A. James Sarkisian, Hearing Judge
The Honorable Linda P. Hamilton, Chairman
Cause No. C-166087

MARCH 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Mari A. Schultz ("Schultz") appeals from a negative award entered against her by the Worker's Compensation Board ("the Board") in favor of Defendant-Appellee Franklin Logistics, Inc., ("Franklin"). We affirm.

FACTS AND PROCEDURAL HISTORY

In adopting the decision of the single hearing member, the Board concluded that Schultz's claimed injuries were neither caused by nor exacerbated by an incident related to her employment with Franklin on October 28, 2002. The incident involved a low-speed collision between her forklift truck and a bumper guard used with regard to loading a trailer. When the forklift struck the bumper guard, it stopped abruptly. Schultz complained of pain in her neck and shoulders at the time but did not seek medical attention until approximately one or two weeks later. She was referred to Doctor Acosta-Rodriguez who treated her conservatively for a period of time until she was released "to regular duties as tolerated" on December 18, 2002.

Schultz sought no additional medical treatment until March 17, 2003, when she saw Dr. John Gorup. According to Dr. Gorup, an MRI disclosed rotator cuff tears in both the left and the right shoulders. Dr. Gorup performed surgery upon one rotator cuff and her right clavicle in April of 2003, followed by cervical spine surgery and upon her neck and the other rotator cuff in June and July of the same year.

The record reflects a substantial history of previous problems with Schultz's neck, shoulders and back dating to 1970, 1978, l986, and 1988. Following the forklift incident of 2002 and as earlier noted, Dr. Acosta Rodriguez on December 4, 2002, released

Schultz to "return to work with restrictions . . . She may drive her vehicle at this time."[1] The doctor found her to have "full normal cervical spine range of motion in both directions" and that his assessment was "1. Cervical pain, significantly improved. 2. Facet pain, resolved." (Appellee's App. at 7).

A subsequent report, dated December 18, 2002, recited that Schultz was complaining of cervical pain and facet pain and that she had a significant increase in the pain in her neck and shoulders. The range of motion of the cervical spine was found to be limited and the findings "are significantly worse than they were on any of her previous examinations [and] I find no medically related reason for this to be so at this time." (Appellee's App. at 8).

DISCUSSION AND DECISION

Standard of Review

Schultz's attorney stated at the outset of the hearing before the single hearing member that the parties had stipulated that there were multiple depositions and medical records and "we would just stipulate that those copies would be the published copies in lieu of the originals, so we don't clog up your file." (Tr. at 4).

The parties did not stipulate to an exhibit of Schultz's notes in a diary-like form. Her attorney, however, said he intended to offer those notes into evidence over objection and the hearing member advised that he was "going to allow that information to come in." (Tr. at 5). In addition, Schultz and one witness for Franklin testified directly and

[1] Presumably, this mention of "her vehicle" refers to her forklift truck.

upon cross-examination. It therefore clearly appears that the hearing member did not rely exclusively upon the paper record before him.

Nevertheless, Schultz maintains that because the sole issue relates to the medical determinations made upon the paper record, that record is the only relevant material for our appellate review. Accordingly, Schultz contends that we should afford no deference to the factual determinations of the hearing member and the full Board but should conduct our own *de novo* review in light of GKN Co. v. Magness, 744 N.E.2d 397 (Ind. 2001). We respectfully reject this contention and find Magness to be distinguishable.

In Magness, an evidentiary hearing was not conducted upon the employer's motion to dismiss for lack of jurisdiction. The motion was based upon the premise that as an employee of a separate entity involved with the construction project, the claimant's sole remedy was under the Worker's Compensation Act. The Supreme Court observed that although there were several facts in dispute and disagreements as to inferences to be drawn from undisputed facts, the trial court in the claimant's personal injury suit made its determination solely upon the basis of the paper record. Unlike in the case before us, there was no question as to the credibility of the claimant. Here, as noted, Schultz testified at the hearing and, in light of other matters before the hearing member and the Board, her credibility was very much placed in issue, particularly as to the matter of causation of the necessity for surgery upon her neck, shoulders, and cervical back.

Although the "Joint Stipulation" stated that the parties "hereby stipulate the following true and accurate facts . . ." (Appellant's App. at 30), other than the fact of employment and the occurrence of a forklift incident, the crucial matters as to causation

of Schultz's medical situation and the need for surgery by Dr. Gorup were the mere subject of Schultz's factual contentions and the opinion of Dr. Gorup (Finding 13, Appellant's App. at 6) as opposed to an opinion by Dr. Coscia (Findings 16 and 17, Appellant's App. at 6).[2]

The Joint Stipulation did not destroy the proffered value as to Dr. Acosta-Rodriguez's treatment and opinion. That view was very much before the hearing member and the Board in contradistinction to Dr. Gorup's opinion. In addition, the hearing member and the Board were entitled to consider the opinion of Dr. Coscia and the credibility of Schultz as to her complaints and the source thereof. For the above reasons, we decline to hold that the determination of the hearing member as adopted by the Board was made upon unchallenged facts or inferences and solely upon a paper record. Accordingly, the Board determination is entitled to our deference as to its fact-finding function.

Discussion Upon The Merits

Schultz makes a two-pronged argument. She first postulates that the evidence unmistakably demonstrates that the medical problems with her shoulders, neck and back, which necessitated the surgery by Dr. Gorup, were occasioned by the accident involving her forklift. As an alternative, she maintains that at a minimum the work accident exacerbated the prior conditions and that such aggravations are compensable.

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[2] Dr. Coscia examined Schultz at Franklin's request. He concluded that "based on the Plaintiff's long-standing history of bilateral shoulder problems, her injuries and resultant surgeries were not the result of the work incident." (Appellant's App. at 6). He also concluded that "while the Plaintiff may have suffered a strain of the cervical spine from the work incident, the need for surgical intervention was not related to the strain" Id.

Franklin defends the negative award arguing that there was ample evidence from which the hearing member and the Board could conclude that there was no causal nexus between the medical conditions necessitating Dr. Gorup's surgery and the forklift incident, but rather those conditions present at the time of the surgeries were the result of the pre-existing conditions. Franklin does not separately address Schultz's claim as to exacerbation of pre-existing conditions.

It is well established that the claimant bears the burden of proving her entitlement to compensation under the Worker's Compensation Act. Mueller v. Daimler Chrysler Motor Corp., 842 N.E.2d 845 (Ind. Ct. App. 2006). In the event, as here, the Board denies the claim for compensation, a claimant appeals from a negative award. Id. The losing claimant is in the same position as a losing plaintiff in a civil action and on appeal must therefore demonstrate that the evidence leads unerringly to a conclusion contrary to that reached by the Board. Borgman v. Sugar Creek Animal Hospital, 782 N.E.2d 993, 996 (Ind. Ct. App. 2002), trans. denied (holding that "a negative award may be sustained by an absence of evidence favorable to the claimant's contentions or by the presence of evidence adverse to the claimant's arguments").

Schultz argues that the evidence strongly shows that the forklift incident caused the neck and shoulder problems and that any prior problems were to the lumbar back, not to the cervical area. She further maintains that the bilateral shoulder arthritic condition did not indicate any rotator cup injury as per Dr. Gorup's deposition, and that such rotator cup tears were recent.

Finally, as a conditional argument, Schultz maintains that even the pre-existing conditions played a partial role in her most recent medical conditions, the forklift incident constituted a compensable aggravation of the prior conditions. In this regard, she cites to Ind. Code § 22-3-3-12[3] and Bertoch v. NBD Corp., 813 N.E.2d 1159 (Ind. 2004).[4]

As to the basic issue, Schultz accurately notes that Dr. Gorup testified that the right rotator cuff tear he surgically repaired was "most likely" [not] a longstanding chronic type of rotator cuff tear." (Appellant's App. at 93). As to the left shoulder, he stated that the rotator cuff tear "could . . . indicate a new or relatively fresh traumatic event." (Appellant's App. at 97) (Emphasis supplied). He further opined that there was "more than a 50 percent chance [that both shoulder injuries] could be work related." As to the matter of aggravation, Dr. Gorup was of the opinion that the "accident was sort of the straw that broke the camel's back or was the event that brought all those things [her medical situation] to the forefront." (Appellant's App. at 101).

Notwithstanding Dr. Gorup's testimony, Franklin appropriately points to contrary evidence by Dr. Coscia who examined Schultz in 2004 after her surgery by Dr. Gorup. Dr. Coscia reviewed her medical history and noted the preexisting symptoms she had experienced in her shoulders and neck. He also noted certain discrepancies between her

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[3] Ind. Code § 22-3-3-12 provides that if a permanent injury for which compensation is claimed results only in the aggravation or increase of a previous physical condition, the Board must determine the extent of the previous condition and may award compensation only for the aggravation or increase resulting from the subsequent permanent injury.

[4] Franklin does not address the aggravation of previous condition issue. It relies wholly upon its position that the Board was entitled, under the evidence, to conclude that there was no causal relationship between the forklift incident and the injuries of which Schultz now complains.

oral medical history and the medical records themselves.[5] He further noted the degenerative changes in her shoulders and neck as reflected in her 2002 MRI. It was his view that Schultz's cervical spinal changes were degenerative, longstanding, and unaffected by the forklift incident. He could find no basis for the C5-C6 cervical spinal fusion.

In summation, Dr. Coscia concluded that Schultz's bilateral shoulder problems "are chronic and longstanding, not related to her work related injury." (Appellant's App. at 110). He further concluded that problems with her cervical spine were not work related and in any event did not call for surgical intervention.

Quite clearly, Dr. Gorup's medical assessment and his surgical intervention met with medical disapproval from Dr. Coscia. We hold that, particularly in light of questions as to the credibility of Schultz, it was reasonable for the Board to infer that Schultz's symptoms and the resultant surgery by Dr. Gorup were related to her pre-existing degenerative conditions as opposed to the forklift incident.

CONCLUSION

The evidence did not unerringly compel a conclusion that Schultz was entitled to a compensation award; accordingly, we affirm the negative award entered against her.[6]

Affirmed.

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[5] It may be noted that Dr. Gorup's opinions depended in large measure upon the medical history given him by Schultz herself rather than from actual prior medical records. To the extent that her recitation of her medical history was inaccurate or even misleading, such may have impacted the weight to be given Dr. Gorup's opinion.

[6] In light of our holding upon the basic underlying issue, we find it unnecessary to address the matter of aggravation of the pre-existing conditions.

VAIDIK, J., and MATHIAS, J., concur.